IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 486 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SINDHI IQBALMIYA FULAMIYA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 486 of 1994

MR EE SAIYED for the appellants

Mr. B.D.Desai, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 21/11/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants, original accused, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1974 ('Code' for short), have challenged the judgment and order dated April 26, 1994, passed by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No. 57 of 1993, by which judgment and order, the appellants were convicted under Section 302 read with Section 34; under Sections 323, 324, 326 read with Section 149, and under Sections 147 and 148 of the Indian Penal Code ('IPC' for short) and under Section 135 of the Bombay Police Act, and sentenced to undergo (i) R.I. for life for the offence under Section 302 read with Section 34 of the IPC; (ii) R.I. for three months under Section 323 of the IPC, six months under Section 324 of the IPC, one year under Section 326 read with Section 149 of the IPC and fine of Rs.100, Rs.200 and Rs.300 in default R.I. for 15 days; (iii) R.I. for three months under Section 147 of the IPC, R.I. for six months under Section 148 of the IPC, and fine of Rs.100 and Rs.200 in default R.I. for 7 days and 15 days respectively; and (iv) R.I. for 5 days and fine of Rs.50 in default S.I. for three months under Section 135 of the Bombay Police Act.

2. Briefly stated, the prosecution case is as under: Musekhan Sumerkhan was a resident of town Idar. Musekhan had six sons, the eldest being P.W.8, Ismail Miya, second son Mohmadkhan, third son Ayubkhan, fourth son Sabirkhan, fifth son Mehmoodkhan, and the youngest son Rafikkhan (since deceased). On May 2, 1993, there was a quarrel between the children of Gulumiya and Mohmadmiya. On the day of the incident, P.W.7, complainant, Ferozkhan, and his nephew deceased Rafikkhan, were proceeding from the locality of Panch Hatadi to tower in the town of Idar. When they reached near the hospital of Dr. Kotadiya around 8 a.m., one auto-rickshaw came behind the back of the abovereferred two persons and the said auto-rickshaw was bearing RTO Registration No.8177. From the said rickshaw, all the five appellants got down and came charging towards the complainant and the deceased. Appellant No.2, Zakirmiya Gulumiya, was carrying an axle of auto-rickshaw and appellant No.3, Sindhi Salimmiya Gulumiya, was carrying a stick. Appellant No.2, Zakirmiya Gulumiya, had inflicted blows with axle on the head of deceased Rafikkhan whereas appellant No.3, Sindhi Salimmiya Gulumiya, had given stick blow on the waist portion of the deceased. The other three appellants had given kick and fist blows to the deceased. P.W.7, complainant, Ferozkhan, had intervened to rescue the

deceased and, in that process, appellant No.2, Zakirmiya Gulumiya, had given an axle blow on his right hand which was landed on the index finger of P.W.7. Deceased Rafikkhan was seriously injured and, therefore, he had raised shouts and had run towards his house situated in Panch Hathdi. In the meanwhile, P.W.7, Ferozkhan, went to the house of his eldest brother, P.W.8, Ismailkhan, to inform about the assault launched on deceased Rafikkhan. Deceased Rafikkhan was taken to the Civil Hospital, Idar, in an auto-rickshaw of one Bakabhai Rasulbhai. It is the prosecution case that the deceased had succumbed to the injuries on the spot and, therefore, P.W.7, Ferozkhan, had gone to lodge First Information Report at the Idar Police Station against the appellants. The said First Information Report was registered at C.R. No.I-65 of 1993 at Idar Police Station. The investigation of the above crime was handed over to P.W.10, PSI, Chavda. PSI, Chavda, had held inquest of the body of deceased Rafikkhan and, thereafter, the dead body was sent to Idar Civil Hospital for post-mortem. The post-mortem of the body of deceased Rafikkhan was performed by P.W.1, Dr. Purshottam Gohil, on May 3, 1993 around 11.30 a.m. and was completed at 1.30 p.m. PSI,Chavda, had proceeded to the place of the incident where, in the presence of the panchas, panchanama of the place of the incident was drawn. PSI, Chavda, had recorded statements of Ismailbhai, Umarbhai, Ramjibhai, etc. on the same day. All the appellants came to be arrested on May 3, 1993 and they were taken in to custody under arrest panchanamas. The appellant No.3 had surrendered himself before the police with muddamal stick which was used in commission of the crime and the said stick was seized under a panchanama. The appellant No.2 had shown willingness to produce muddamal axle with which he had inflicted fatal blows on the head and other parts of the body of deceased Rafikkhan and, accordingly, the muddamal axle was recovered on May 4,1993 by a panchanama drawn under Section 27 of the Evidence Act. The muddamal auto-rickshaw was seized on May 4, 1993 under a panchanama. On completion of the investigation, chargesheet came to be filed against the appellants for the offences under Sections 302, 147, 148, 149, 323, 324 of the IPC and Section 135 of the Bombay Police Act in the Court of the learned Judicial Magistrate, First Class, Idar, which came to be numbered as Criminal Case No.806 of 1993. As the offence under Section 302 of the IPC is exclusively triable by the Court of Sessions Judge, the learned Judicial Magistrate, First Class, Idar, committed the case to the Court of Sessions, Sabarkantha, at Himatnagar, which came to be numbered as Sessions Case No.57 of 1993.

3. Charge Exh.2 was framed against the appellants for the offences under Sections 147, 148, 302 read with 149 and under Section 326 of the IPC against the appellant No.3, under Section 326 read with Section 149 against the appellant Nos. 1, 2, 4 and 5, under Section 302 of the IPC against the appellant No.2 and under Section 324 of the IPC against the appellant No.2 for causing injuries to P.W.7, complainant, Ferozkhan. The appellants Nos. 1, 4 and 5 were also charged for having committed offence under Section 323 read with Section 149 for causing injuries to deceased Rafikkhan. The appellant No.2 was also charged for offence under Section 135 of the Bombay Police Act. The charge was read over and explained to the appellants wherein they pleaded not guilty and claimed to be tried. The prosecution, in order to prove the charges framed against the appellant, examined (1) P.W.1, Dr.Purshottam Gohil,Exh.12, (2) P.W.2, Sattarkhan Usmankhan, panch of inquest panchanama, Exh.18 (3) P.W.3, Hasmukhkumar Dahyalal Pandya, panch of panchanama of seizure of axle, Exh.25; (4) P.W.4, Panch Vitthalbhai Nanjibhai, Exh.28; (5) P.W.5, Ramjibhai Manabhai, Exh.29; (6) P.W.6, Umarbhai Rasulbhai Exh.30; (7) P.W.7, Ferozkhan Husainkhan, complainant, brother of deceased Rafikkhan, Exh.31; (8) P.W.8, Ismailkhan Musekhan, eldest brother of deceased Rafikkhan, Exh.33; (9) P.W.9, Head Constable, Maganbhai Pannabhai, Exh.34 and (10) P.W.10, IO, PSI, Takhatsinh Chavda, Ex.35. The prosecution produced documentary evidence such as post-mortem notes Exh.13, injury certificate of P.W.7, Ferozkhan, Ex.15, panchanama of scene of offence Exh.26, First Information Report Exh.27, inquest panchanama, panchanama of seizure of the muddamal axle, to prove the case against the appellants. After the evidence of the prosecution was over, the appellants were questioned generally and their statement came to be recorded under Section 313 of the Code. The defence of the appellants was of general denial. No defence witness was examined by the police.

4. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, came to the conclusion that all the appellants had formed unlawful assembly to commit illegal acts and were armed with weapons like stick and axle of auto-rickshaw. It was further deduced that all the appellants had common intention to commit murder of deceased Rafikkhan. It was further deduced that all the appellants, who were members of the unlawful assembly, had common intention of causing simple as well as

grievous injuries to deceased Rafikkhan. It was further held that appellant No.2, Zakirmiya Gulumiya, by keeping in his possession an axle, had committed offence under Section 135 of the Bombay Police Act. On the abovereferred to conclusions, the learned Additional Sessions Judge convicted and sentenced the appellants for the offences, as narrated in paragraph 1 of this judgment, which has given rise to filing of this appeal.

5. Learned advocate Mr. Saiyed for the appellants and learned Additional Public Prosecutor, Mr. B.D.Desai, have taken us through the entire record and proceedings of the case. We have heard learned counsel for the parties and have also gone through the judgment of the learned Additional Sessions Judge.

6. Learned advocate Mr. Saiyed for the appellants has submitted that there was no common intention on the part of the appellants to cause murder of deceased Rafikkhan. It is further submitted that the incident in question had taken place due to a quarrel which had taken place between the children of the two groups on the previous day. It is contended that, at the most, it can be said that the appellants wanted to teach a lesson to deceased Rafikkhan by causing injuries on him. It is contended that the prosecution had led no evidence that there was previous meeting of mind between the appellants to cause murder of the deceased. It is also contended by the learned advocate Mr. Saiyed for the appellants that, though the incident in question had taken place on a public road where many independent witnesses were available, yet the prosecution had only examined interested and related witnesses in the case. Learned advocate Mr. Saiyed for the appellants has next contended that there was no cogent and reliable evidence led by the prosecution for holding the appellants guilty for the offences punishable under Section 302 read with Section 34 of the IPC and, at the most, the appellants can be convicted and sentenced for their individual acts. In support of his submission, learned advocate Mr. Saiyed for the appellants has placed reliance on the decision of the Supreme Court in the case Sukhanrao and others vs. State of Bihar, reported in 2002 SCC (Cri) 936. The learned advocate Mr. Saiyed for the appellants also submitted that mere presence in an assembly of persons does not make the accused a member of unlawful assembly unless it is shown by direct or circumstantial evidence that the accused shared common object of the assembly. In support of his submission, learned advocate Mr. Saiyed for the appellants has also placed reliance on the decision of

the Supreme Court in the case of Musakhan and others vs. State of Maharashtra, reported in 1977 SCC (Cri) 164. In the alternative, it is submitted by learned advocate Mr. Saiyed for the appellants that there was no common intention on the part of the appellants to cause murder of deceased Rafikkhan and, at the most, the appellant No.2 can be held responsible for committing the individual act for inflicting the fatal blows with the muddamal axle on the head and other parts of the body of the deceased, whereas other appellants can be convicted and sentenced for the offence under Section 323 or 324 of the IPC for their individual acts. It is, therefore, contended by learned advocate Mr. Saiyed for the appellants that suitable orders may be passed by altering the conviction and sentence imposed on the appellants Nos.1,3, 4 and 5.

7. Learned Additional Public Prosecutor, Mr. B.D.Desai, has submitted that sufficient evidence was led by the prosecution to hold that there was common intention on the part of the appellants to cause murder of deceased Rafikkhan and, in furtherance of their common intention, they had arrived at the place of incident in one auto-rickshaw and had launched the attack on the deceased. It is contended that all the appellants had formed unlawful assembly with the common object to cause injuries to deceased Rafikkhan and P.W.7, Ferozkhan, and, therefore, the conviction and the sentence recorded by the learned Additional Sessions Judge should be confirmed and the appeal be dismissed.

8. It is not in dispute that deceased Rafikkhan died homicidal death. This fact is also proved by the oral evidence of P.W.1, Dr. Purshottam Gohil and the post-mortem notes Exh.13, that, due to the injuries inflicted on various parts of the body of deceased Rafikkhan by the appellant No.2, deceased Rafikkhan had died homicidal death. The oral evidence of P.W.7, Ferozkhan, who had also got injuries in the said incident, also proved beyond doubt that the appellant No.2 had caused fatal injuries with axle of auto-rickshaw on the vital parts of the body of the deceased. The evidence of P.W.7, Ferozkhan, also proves beyond doubt that the appellant No.2 had acted in most cruel manner and inflicted successive blows with axle on the head and other parts of the body of the deceased. An endeavour was made by the learned advocate for the appellants that the offence committed by the appellant No.2 would fall in the exceptions of Section 300 of the IPC and, therefore, the conviction and the sentence imposed by the learned Additional Sessions Judge be altered suitably. We do not

find any substance in the above submission of the learned advocate for the appellants. The appellant No.2 had acted in most cruel manner and had selected the vital parts, i.e. the head of deceased Rafikkhan, for inflicting the fatal blows with the axle, which had caused the death of Rafikhan instantaneously. By no stretch of imagination, it can be said that the act committed by the appellant No.2 would fall in any of the exceptions of Section 300 of the IPC. We are fully satisfied that, by the cruel act committed by the appellant No.2 for inflicting successive blows with axle on the head and other parts of the body of the deceased, he had committed the murder of the deceased and the case of the appellant No.2 would squarely fall under Section 302 of the IPC. We, therefore, confirm the conviction of the appellant No.2, Zakirmiya Gulumiya, under Section 302 of the IPC and the sentence to undergo R.I. for life imposed on the appellant No.2, Zakirmiya Gulumiya, by the learned Additional Sessions Judge.

9. The submission of the learned advocate for the appellants that there was no evidence led by the prosecution to establish that the appellants Nos. 1, 3, 4 and 5 had shared common intention with the appellant No.2 to cause the murder of deceased Rafikkhan, deserves merit. We have carefully scanned through the oral as well as documentary evidence. We are of the view that no evidence was led by the prosecution at the trial that there was previous meeting of mind between the appellants to cause the murder of deceased Rafikkhan, and, in furtherance of the common intention, they had launched attack on him. If there was a prior concert, then all the appellants would have carried deadly weapons with them to cause the murder of deceased Rafikkhan. The appellants Nos.1, 3, 4 and 5 were not armed with any weapon. The common intention can be inferred from the circumstances also, but the circumstances emerging from the record of the case do not establish beyond doubt that there was prior meeting of mind between the appellants and there was common intention on their part to cause the murder of deceased Rafikkhan. At the best, it can be inferred that the appellants wanted to teach a lesson to deceased Rafikkhan and P.W.7, Ferozkhan for the incident which had taken place on the previous day, i.e. a quarrel between the children of the two groups. Therefore, we are of the firm view that there was no common intention on the part of the appellants Nos.1,3, 4 and 5 along with the appellant No.2 to cause the murder of deceased Rafikkhan. Therefore, the conviction of the appellants Nos. 1, 3, 4 and 5 under Section 302 with the aid of Section 34 of the IPC and the sentence to undergo

R.I. for life imposed on them by the learned Additional Sessions Judge, deserves to be quashed and set aside.

10. All the five appellants had come in the auto-rickshaw to commit illegal acts of lodging an attack on deceased Rafikkhan and to cause injuries to P.W.7, Ferozkhan. Therefore, the conviction of the appellants under Sections 147 and 148 of the IPC recorded by the learned Additional Sessions Judge, deserves to be confirmed.

11. The appellants Nos.1, 3, 4 and 5 had caused injuries to deceased Rafikkhan by giving stick as well as kick and fist blows. Appellant No.2, Zakirmiya Gulumiya, had also caused injuries with the axle to P.W.7, Ferozkhan. The injury certificate of P.W.7, Ferozkhan, produced at Exh.15, proves that he had sustained injury by the axle blow on his index finger. Therefore, appellant No.2, Zakirmiya Gulumiya, should be convicted for causing injuries to P.W.7, Ferozkhan, by committing offence under Section 323 of the IPC. The appellants nos.1, 3, 4 and 5 should be convicted for causing simple injuries to deceased Rafikkhan which is punishable under Section 323 read with Section 149 of the IPC. The conviction of appellant No.2, Zakirmiya Gulumiya, under Section 135 of the Bombay Police Act recorded by the learned Additional Sessions Judge, deserves to be confirmed.

12. As a result of foregoing discussion, the appeal is partly allowed. The conviction and the sentence of the appellants under Section 302 read with Section 34 of the IPC for causing the murder of deceased Rafikkhan, recorded by the learned Additional Sessions Judge, Sabarkantha, at Himatnagar, in Sessions Case No. 57 of 1993, are quashed and set aside. The appellant No.2, Zakirmiya Gulumiya, is alone convicted under Section 302 of the IPC for causing the murder of deceased Rafikkhan and is sentenced to undergo R.I. for life and to pay fine of Rs.100 in default R.I. for 15 days. The conviction of the appellants under Sections 147 and 148 of the IPC is hereby confirmed, and all the appellants are sentenced to undergo R.I. for three months for both the offences and to pay fine of Rs.100 each in default R.I. for seven days. The appellants Nos. 1, 3, 4 and 5 are convicted under Section 323 read with Section 149 of the IPC and sentenced to undergo R.I. for six months. The conviction of appellant No.2, Zakirmiya Gulumiya, for causing injury to P.W.7, Ferozkhan, is altered from Section 324 to Section 323 of the IPC and appellant No.2, Zakirmiya Gulumiya, is sentenced to undergo R.I. for six months and to pay fine of Rs.500 in default R.I. for one

month. The conviction of appellant No.2, Zakirmiya Gulumiya, under Section 135 of the Bombay Police Act and the sentence imposed on him to undergo R.I. for five days and to pay fine of Rs.50 in default S.I. for three days, are confirmed. The conviction and the sentence imposed on all the appellants under Sections 324 and 326 read with Section 149 of the IPC are hereby quashed and set aside. All the sentences imposed on the appellants shall run concurrently. The bail bonds of the appellants nos.1, 3, 4 and 5 shall stand cancelled. The muddamal be disposed of in terms of the directions contained in the impugned judgment and order.

November 21, 2002 (M.H. Kadri, J.)

(M.C. Patel, J.)
(swamy)